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09 SEP 14 PM 2:50
RICHARD W. BUEKING
CLERK, U.S. DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

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UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

SC

PHILIP STERKER, on behalf of himself and all others similarly situated,

Plaintiff,

vs.

APPLE, INC.; AT&T MOBILITY, L.L.C.,
and DOES 1-10,

Defendants.

COMPLAINT FOR VIOLATION OF
CONSUMER PROTECTION STATUTES

CLASS ACTION

DEMAND FOR JURY TRIAL

COMES NOW Plaintiff, by and through his undersigned counsel, on behalf of himself and all others similarly situated, and for his complaint against Defendants, on information and belief, states as follows:

NATURE OF THE CASE

1. Plaintiff, on behalf of himself and all others similarly situated, brings this case as a Class Action on behalf of all purchasers of iPhone 3G and/or 3G-S from either Apple, Inc. or AT&T Mobility, LLC, as further defined herein. Apple, Inc., in the marketing and sale of its

ORIGINAL

BY FACSIMILE

1 iPhone 3G and 3G-S mobile phones from its California headquarters, has engaged in conduct
 2 which is likely to mislead and has misled or deceived the public through (1) omission,
 3 suppression and concealment from the public of material facts related to the iPhone 3G and 3G-S
 4 mobile phones' MMS features, and (2) making and disseminating and/or causing to made or
 5 disseminated untrue and/or misleading statements which were known or which by the exercise of
 6 reasonable care should have been known to be untrue or misleading. AT&T Mobility, LLC, in
 7 the marketing and sale of (a) iPhone 3G and 3G-S mobile phones, and (b) the marketing and sale
 8 of messaging bundles as part of the iPhone service plans, has engaged in conduct which is likely
 9 to mislead and has misled or deceived the public through (1) omission, suppression and
 10 concealment from the public of material facts related to the iPhone 3G and 3G-S mobile phones'
 11 MMS features, and (2) making and disseminating and/or causing to made or disseminated untrue
 12 and/or misleading statements which were known or which by the exercise of reasonable care
 13 should have been known to be untrue or misleading.

14 JURISDICTION

15 2. Plaintiff Philip Sterker is a resident of San Mateo County, California and a citizen
 16 of California. Plaintiff purchased an iPhone 3G-S from Defendant Apple, Inc. in Burlingame,
 17 California in July of 2009. At the time he purchased his iPhone 3G-S, Plaintiff believed that he
 18 would have MMS capability, particularly because he had observed Defendants' advertisements
 19 touting MMS capability.

20 3. Defendant AT&T Mobility, L.L.C. ("AT&T") is a Delaware limited liability
 21 corporation with its principal place of business in Atlanta, Georgia. AT&T is a citizen of
 22 Georgia and Delaware.

23 4. Defendant Apple, Inc. ("Apple") is a California corporation with its principal
 24 place of business in Cupertino, California. Apple is a citizen of California.

25 5. The true names and capacities, whether individual, corporate, associate or
 26 otherwise, of Defendant Does 1-10, inclusive, are unknown to Plaintiff, who therefore sues such
 27 Defendants by such fictitious names. Plaintiff will amend this Complaint to show such
 28 Defendants' true names or capacities when the same has been ascertained. Plaintiff is informed

1 and believes and thereon alleges that each of said fictitious named Defendants is responsible in
2 some manner for the occurrences herein alleged.

3 6. The amount in controversy in this action, as defined by 28 U.S.C. § 1332(d)(6),
4 exceeds \$5,000,000 exclusive of costs and interest.

5 7. Apple and AT&T are residents of this judicial district as each has ongoing and
6 systematic contacts with residents of the Northern District of California. Defendants have at all
7 relevant times engaged in the manufacturing, distributing, marketing, promoting and selling of
8 iPhones and mobile phone services to residents of the U.S. and this judicial district.

9 **INTRA-DICTRICT ASSIGNMENT**

10 8. Pursuant to Civil Local Rule 3-2(c), this case has been assigned to the San
11 Francisco/Oakland Division of this Court, as a substantial part of the events or omissions which
12 give rise to Plaintiff's claims occurred in San Mateo County.

13 **COMMON FACTS**

14 9. The iPhone was developed through collaboration between Apple and AT&T and
15 is sold by both companies.

16 10. Apple is a personal computing and digital media distribution company. Its
17 products include Mac computers, iPod digital music players, iTunes online music store, and
18 iPhone mobile phones. It generated \$32 billion in revenue in fiscal 2008.

19 11. AT&T is one of the largest mobile phone companies in the world, with roughly 80
20 million wireless subscribers and \$124 billion in revenue in fiscal 2008.

21 12. Apple and AT&T are both Fortune 100 companies.

22 13. In October 2008, Apple CEO Steve Jobs announced that based on revenue, Apple
23 had become the third-largest mobile phone supplier in the world.

24 14. The iPhone 3GS sold over one million units in its first three days on the market,
25 which included the best sales day in Apple history.

26 15. From the introduction of the iPhone 3G in June of 2008 through June 27, 2009,
27 ten days after the iPhone 3G-S was launched, Apple has sold over 20 million iPhones.

28

1 16. Since its creation, one flaw of the iPhone was that it did not allow "Multimedia
2 Messaging Service," or "MMS," which, among other things, allows users to send pictures to
3 another user's cell phone.

4 17. MMS is similar to text messages in the way the data is transmitted from mobile
5 phone to mobile phone. AT&T, along with all other service providers, sells text and MMS
6 messaging in a "bundle" wherein messaging in both formats is offered for a fixed price each
7 month as part of the service agreement.

8 18. Text messages and MMS differ in the size of the data and speed of data
9 transmission. The size of an MMS message can be much larger than a text message (*e.g.*,
10 hundreds of kilobytes as opposed to only 256 bytes). MMS picture messages take longer to send
11 and receive and because of the size of MMS messages, transmission of MMS is much more
12 costly for AT&T than transmission of text messages.

13 19. While a typical mobile phone might be able to receive 20 SMS text messages per
14 minute, that same mobile phone may only be able to receive a single MMS picture message per
15 minute. Since the amount of data is greater, mobile operators - including AT&T - charge a
16 higher fee per message sent and received.

17 20. In 2008, Apple represented in its advertising that the new version of iPhone, the
18 3G (and subsequently again with the even newer version, the 3G-S) would allow MMS. Apple's
19 print and video advertisements on television, the Internet, the radio, newspapers, and direct
20 mailers all explicitly represented the availability of MMS.

21 21. AT&T also advertised that the iPhone 3G and 3G-S would allow MMS
22 Messaging.

23 22. MMS functionality is material to the consumer and one of the reasons people
24 choose to buy or upgrade to an iPhone 3G or 3G-S.

25 23. MMS has been available on other types of cell phones for many years. AT&T
26 offers and supports MMS on at least 12 other mobile phones sold both by AT&T and mobile
27 phone companies for use on the AT&T mobile network.

28 24. After the 3G iPhone came out in July 2008, customers who purchased the 3G

1 iPhone began to realize that MMS Messaging was not available.

2 25. At that time, AT&T published this in the AT&T Answer Center page of its
3 website for problems related to MMS:

4 Customers who are sent a MMS message and own a non-MMS capable device will
5 receive a text message instead of an actual MMS message. The message will contain the
6 website address of www.viewmymessage.com/1 or www.viewmymessage.com/2 as well
7 as a user name and password. To view the MMS message, please access the website
8 from a computer and enter the user name and password provided in the text message.

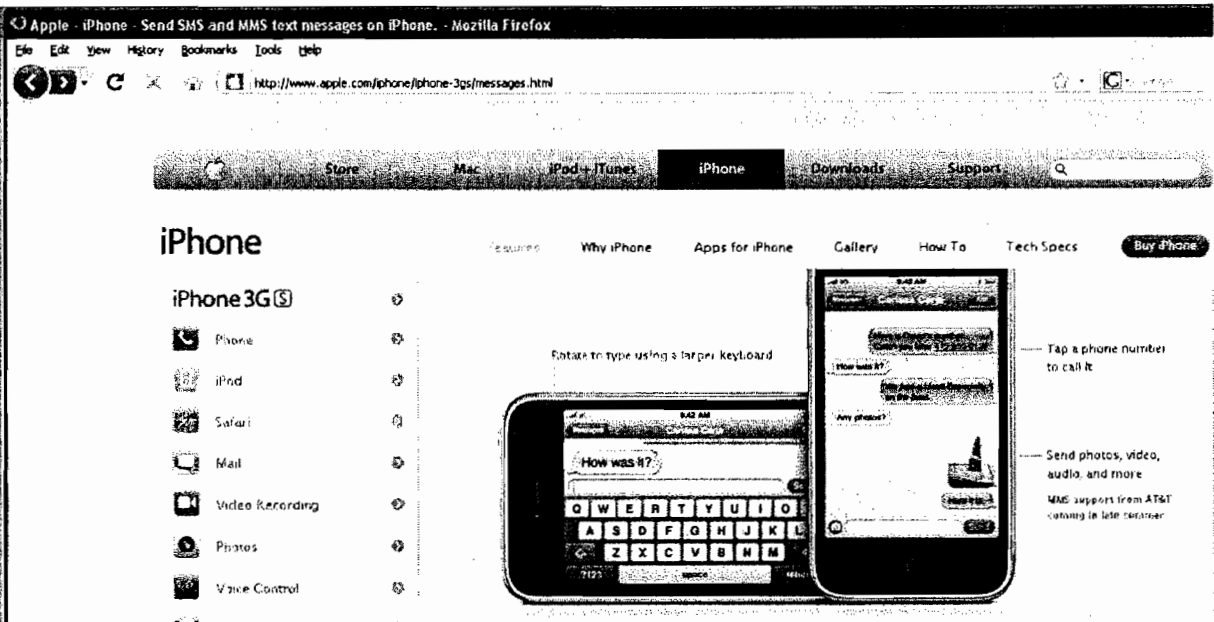
9 26. AT&T was instructing customers interested in MMS to access a website from a
10 computer to view a message sent from one mobile phone to another mobile phone.

11 27. In early 2009, both Apple and AT&T again represented that MMS would be
12 available on both the iPhone 3G and the 3G-S beginning on June 17, 2009, when the new iPhone
13 OS 3.0 Software Update would become available.

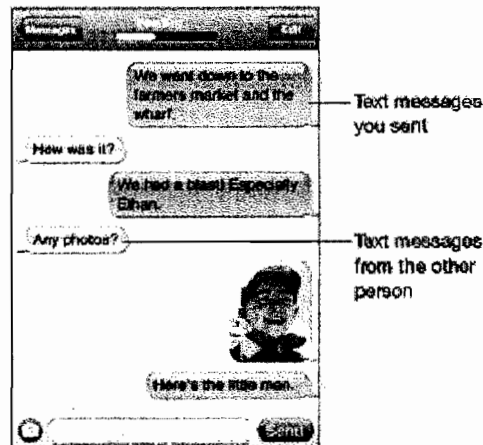
14 28. In the spring of 2009, Apple and AT&T initiated a massive advertising campaign
15 to sell its older 3G models in preparation for the launch of 3G-S. AT&T and Apple lowered the
16 price of the least expensive iPhone 3G to \$99 and represented to potential customers that the new
17 3.0 Software Upgrade would provide MMS support.

18 29. Apple posted on its website, on the "iPhone OS 3.0 Software Update" page, that
19 MMS would be available, so that customers could "send MMS messages and include photos,
20 audio, and contact info. Even tap to snap a picture right inside Messages." A graphic showed
21 the iPhone text message bubbles with a picture inserted.

22 30. Currently, a similar graphic appears on Apple's website touting the iPhone 3G and
23 its ability to "send photos, video, audio and more" with a mouseprint disclaimer indicating
24 "MMS Support from AT&T coming in late summer."
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31. Millions of customers, as a result of the false and deceptive representations and concealments of Apple and AT&T, purchased the 3G and 3G-S, reasonably expecting to have the ability to send and receive MMS messages. Apple continues to depict MMS picture messages for the iPhone 3G on its website.



32. Even after downloading the new 3.0 Software Update application, MMS still will not work on either the iPhone 3G or 3G-S models.

33. AT&T's iPhone mobile phone messaging service does not support MMS. On its website, Apple currently represents the following:

Send MMS

Take a photo or shoot some video, then send it via Messages. You can also send audio recordings from Voice Memos, contact information from Contacts, and locations from Maps.

1 34. A Pop-Up window on Apple's website reads:

2 *Sharing Photos and Videos*

3 *You can take a photo or make a video (iPhone 3 GS only) from within Messages and include it in your conversation with another MMS-capable device.*

4 35. On its website AT&T currently represents the following:

5 Messages

6 *Use messages to send text, photos, audio, video, and more. Forward a whole message or just the important parts.*

7 36. Regardless of whether consumers purchased their iPhone 3G or 3G-S from Apple
8 or AT&T, the purchase of an iPhone requires a two-year contract for service through AT&T.
9 The iPhone cannot be used on any other mobile phone service network in the United States.

10 37. Regardless of the particular iPhone purchased, the same basic pricing plans exist
11 for all iPhones. For messaging, individual plans through AT&T charge \$20 per month for
12 Messaging Unlimited, \$15 per month for Messaging 1500, and \$5 per month for Messaging 200.
13 Family Plans charge \$30 per month (per phone) for Messaging Unlimited.

14 38. At least 12 other AT&T mobile phones actually do provide MMS as part of the
15 messaging bundles. The AT&T mobile phone network does have the capacity to support MMS
16 services and AT&T provides MMS to non-iPhone customers. However, AT&T does not provide
17 MMS to any iPhone customers despite charging them the same rates for their messaging bundles.

18 39. For every other AT&T mobile phone, Messaging Unlimited, Messaging 1500, and
19 Messaging 200 are the exact same prices, respectively, as the Messaging Unlimited, Messaging
20 1500, and Messaging 200 charges for iPhone customers. Therefore, AT&T is charging iPhone
21 customers the same price for messaging bundles per month but failing to provide the MMS
22 portion of the messaging service - even though it provides this service to all other AT&T mobile
23 phone customers with MMS-capable telephones.

24 40. Millions of purchasers of the 3G and the 3G-S iPhone have been deceived by the
25 Defendants as to the iPhone and its MMS capabilities, which in fact does not currently have
26 MMS functionality.

27 41. Apple and AT&T continue to misrepresent and/or conceal, suppress, or omit
28 material facts to customers in their stores about the MMS functionality of the iPhone 3G and

1 3G-S.

2 42. Plaintiff Philip Sterker purchased his iPhone 3G-S through Apple's Burlingame,
3 California store in July of 2009.

4 43. When purchasing his iPhone, Plaintiff believed that it would provide MMS
5 features. This belief was based in part on the fact that Defendants' deceptive marketing
6 represented that the iPhone 3G-S would have MMS capabilities.

7 44. Plaintiff continues to pay for a messaging bundle at the same rate that AT&T
8 charges customers whose wireless plans offer MMS capabilities, despite the fact that Plaintiff's
9 iPhone does not have such MMS capabilities.

10 **CLASS ACTION ALLEGATIONS**

11 45. This action is brought by Plaintiff Philip Sterker, on his own behalf and on behalf
12 of all other persons similarly situated (hereinafter referred to as the "Class"), pursuant to Fed. R.
13 Civ. P. 23(b)(3), and/or pursuant to Fed. R. Civ. P. 23(b)(2), defined as follows:

14 All consumers residing in the United States who, between July 2008 and
15 the date of final judgment or settlement, have purchased a 3G or 3G-S iPhone
16 from either AT&T Mobility L.L.C. or Apple, Inc. primarily for personal, family,
or household use.

17 46. This action is also brought by Plaintiff Philip Sterker, on his own behalf and on
18 behalf of all other persons similarly situated on behalf of a Sub-Class (hereinafter referred to as
19 the "Sub-Class"), pursuant to Fed. R. Civ. P. 23(b)(3), and/or pursuant to Fed. R. Civ. P.
20 23(b)(2), defined as follows:

21 All consumers residing in the United States who, between July 2008 and
22 the date of final judgment or settlement, have purchased a 3G or 3G-S iPhone
from either AT&T Mobility L.L.C. or Apple, Inc. primarily for personal, family,
or household use and who purchased messaging bundles from AT&T.

23 47. Plaintiff seeks to prosecute this action, pursuant to Fed. R. Civ. P. 23, as a class
24 representative of a class of all consumers in the United States who purchased an iPhone 3G or
25 3G-S; excluding any Judge conducting proceedings in this action, their parents, spouses and
26 children as well as any other member of the judge's household; counsel of record in this action;
27 and the legal representatives, heirs, successors and assigns of any excluded person.

28 48. The proposed Class includes millions of United States residents; the proposed

1 Sub-Class includes thousands, if not millions, of United States residents.

2 49. There are questions of law and fact that are common to the proposed Class, and
3 Sub-Class including, but not limited to, the following:

- 4 a. What are the reasonable expectations of iPhone 3G and 3G-S mobile
5 phone purchasers with regard to the availability of MMS messaging
6 functionality and support;
 - 7 b. Whether the iPhone 3G and 3G-S mobile phones meet the reasonable
8 expectations of purchasers;
 - 9 c. Whether MMS is a material fact in the purchase of a iPhone 3G and 3G-S
10 mobile phone;
 - 11 d. Whether MMS is a material part of the messaging bundle monthly charge
12 from AT&T;
 - 13 e. Whether Defendants' conduct is unlawful, unfair, or fraudulent;
 - 14 f. Whether Defendants engaged in unfair, deceptive untrue or misleading
15 advertising;
 - 16 g. Whether Defendants' conduct is unfair, misleading or tends to mislead;
 - 17 h. Whether Plaintiff was actually deceived;
 - 18 i. Whether Defendants intended the public to be misled into believing that
19 the iPhone 3G and 3G-S mobile phone had the ability to send and receive
20 MMS messages;
 - 21 j. Whether Defendants' conduct is in violation of the California Business &
22 Professions Code § 17200;
 - 23 k. Whether Defendants' conduct is in violation of the California Consumers
24 Legal Remedies Act;
 - 25 l. Whether Defendants' conduct is in violation of the consumer protection
26 laws of other states;
- 27
28

1 m. Whether Defendants have been in possession of moneys that may have
2 been obtained as a result of Defendants' violations of Cal. Bus & Prof
3 Code § 17200; and

4 n. Whether Plaintiff and Class Members are entitled to restitution,
5 compensatory or punitive damages as a result of Defendants' conduct.

6 50. The damages/losses sustained by Plaintiff or individual Class members are
7 relatively small when compared to the expense of litigating the legal and factual issues raised by
8 this lawsuit. As a result, unless this case proceeds as a class action, Plaintiff and Class members
9 will, as a practical matter, be unable to pursue their individual claims. Thus, certification of this
10 case as a class action is the only fair and efficient method for the adjudication of this controversy.

11 51. The prosecution of separate actions by individual members of the Class would
12 create a risk of:

13 a. Inconsistent or varying adjudications with respect to individual members of the
14 Class; and

15 b. Adjudication with respect to individual members of the Class which would, as a
16 practical matter, be dispositive of the interests of other members not parties to the
17 adjudication or substantially impair or impede their ability to protect their interest.

18 52. Plaintiff and his counsel do not envision any unusual difficulty in the management
19 of this action as a class action.

20 53. The common questions set forth above predominate over any issues affecting only
21 individual Class members.

22 54. Plaintiff's claims are typical of the claims of the members of the Class and Sub-
23 Class, as all such claims arise from the purchase of the iPhone 3G or 3G-S, and Plaintiff
24 purchased a messaging bundle from AT&T.

25 55. Class treatment is a superior method for the fair and efficient adjudication of the
26 controversy in that such treatment will permit a large number of similarly situated persons to
27 efficiently prosecute their common claims without the duplication of evidence, effort and
28 expense that would arise from individual actions.

1 meaning of California Civil Code § 1761(a).

2 64. The CLRA provides in pertinent part:

3 *The following ... unfair or deceptive acts or practices undertaken by any person in a*
 4 *transaction intended to result or which results in the sale or lease of goods or services to*
 5 *any consumer are unlawful: ... (5) Representing that goods or services have ...*
 6 *characteristics, ... uses, (or) benefits, ... which they do not have (7) Representing*
 7 *that goods or services are of a particular standard, quality, or grade, ... if they are of*
 8 *another. ... (9) Advertising goods or services with intent not to sell them as advertised. ...*
 9 *(16) Representing that the subject of a transaction has been supplied in accordance with*
 10 *a previous representation when it has not.*

11 Cal. Civ. Code § 1770.

12 65. Defendants, by and through their employees and/or agents, intended to induce
 13 Plaintiff and Class members to purchase their iPhone 3G and 3G-S mobile phones and messaging
 14 service bundles through the unfair and/or deceptive acts or practices described herein.

15 66. The acts or practices that were deceptive, misrepresented, concealed, suppressed
 16 or omitted were material to Plaintiff's, Class members' and Sub-Class members' decisions to
 17 purchase iPhone 3G and 3G-S mobile phones and messaging bundles.

18 67. The facts that were deceptive, misrepresented, concealed or suppressed, as alleged
 19 in the preceding paragraph, occurred in connection with Defendants' conduct of trade and
 20 commerce.

21 68. Defendants' unfair and/or deceptive acts and/or practices violate the CLRA.

22 69. Plaintiff and members of the Class and Sub-Class request that this Court enjoin
 23 Defendants from continuing to employ the unlawful methods, acts and practices alleged above,
 24 pursuant to Cal. Civ. Code § 1780(a)(2). Unless Defendants are permanently enjoined from
 25 continuing to engage in such violations of the CLRA, consumers of Defendants' products will be
 26 damaged by Defendants' acts and practices in the same way as have Plaintiff and members of the
 27 Class.

28 70. Plaintiff does not at present seek damages under this cause of action but intends to
 file an amended complaint in due course under Civil Code § 1782(d), also seeking damages,
 restitution and punitive damages under Civil Code § 1780(a)(1), (3) and (4).

71. By the conduct alleged above, Defendants have engaged in a scheme to cheat a

1 large number of consumers out of individually small sums of money.

2 72. If the Court determines that California law should not be applied to Defendants
3 Apple and/or AT&T with respect to all Class members and Sub-Class members in this case, this
4 count is alternatively brought pursuant to California law for the portion of the Class and Sub-
5 Class and/or with respect to particular defendants for which this Court determines California law
6 is applicable and the concomitant consumer protection laws of other states for the remainder of
7 the Class and Sub-Class and/or claims against particular defendants.

8 COUNT II

9 COMES NOW Plaintiff Philip Sterker, by and through his undersigned counsel, on behalf
10 of himself and all others similarly situated, and for Count II of his Complaint against Defendants,
11 states as follows:

12 73. Plaintiff incorporates paragraphs 1 through 71 by reference, as though fully set
13 forth herein.

14 74. This count is brought pursuant to California Business and Professions Code §
15 17200, or similar state consumer protection laws, by Plaintiff Philip Sterker, on his own behalf
16 and on behalf all others similarly situated against Defendants.

17 75. California Business & Professions Code § 17200 provides that: “*unfair*
18 *competition shall mean and include any unlawful, unfair or fraudulent business act or practice*
19 *and unfair, deceptive, untrue or misleading advertising and any act prohibited by [Section*
20 *17500].”*

21 76. California Business & Professions Code § 17500 provides in relevant part:

22 *It is unlawful for any person, firm, corporation or association, or any employee thereof*
23 *with intent directly or indirectly to dispose of real or personal property or to perform*
24 *services, professional or otherwise, or anything of any nature whatsoever or to induce*
25 *the public to enter into any obligation relating thereto, to make or disseminate or cause*
26 *to be made or disseminated before the public in this state, or to make or disseminate or*
27 *cause to be made or disseminated from this state before the public in any state, in any*
28 *newspaper or other publication, or any advertising device, or by public outcry or*
proclamation, or in any other manner or means whatever, including over the Internet,
any statement, concerning that real or personal property or those services, professional
or otherwise, or concerning any circumstance or matter of fact connected with the
proposed performance or disposition thereof, which is untrue or misleading, and which is
known, or which by the exercise of reasonable care should be known, to be untrue or
misleading, or for any person, firm, or corporation to so make or disseminate or cause to

1 *be so made or disseminated any such statement as part of a plan or scheme with the*
2 *intent not to sell that personal property or those services, professional or otherwise, so*
3 *advertised at the price stated therein, or as so advertised.*

4 77. In the marketing of their iPhone 3G and 3G-S mobile phones and associated
5 messaging bundle service agreements, Defendants have engaged in unfair competition as defined
6 in California Business & Professions Code § 17200, through the practices enumerated in this
7 Complaint.

8 78. Plaintiff Philip Sterker relied on representations made in Defendants' campaign of
9 untrue and/or misleading marketing when choosing to purchase an iPhone 3G-S.

10 79. California Business & Professions Code § 17204 provides for a private cause of
11 action in stating that "[a]ctions for any relief pursuant to this chapter shall be prosecuted
12 exclusively in a court of competent jurisdiction. . . by a person who has suffered injury in fact
13 and has lost money or property as a result of the unfair competition."

14 80. Plaintiff Philip Sterker has suffered injury in fact and has lost money or property
15 as a result of Defendants' unfair competition. Plaintiff purchased the iPhone 3G-S under the
16 impression that it could be used for MMS. Plaintiff continues to pay AT&T for a text messaging
17 bundle at the same rate as bundles that include MMS, despite the fact that his iPhone 3G-S will
18 not permit MMS.

19 81. California Business & Professions Code § 17203 provides the court with available
20 remedies in stating that "[a]ny person who engages, has engaged, or proposes to engage in
21 unfair competition may be enjoined in any court of competent jurisdiction. The court may make
22 such orders or judgments...as may be necessary to restore to any person in interest any money
23 or property ... which may have been acquired by means of such unfair competition."

24 82. The unlawful, unfair, and fraudulent business practices of Defendants described
25 above present a continuing threat to members of the public in that Defendants continue to engage
26 in the conduct described herein.

27 83. Defendants have wrongfully retained moneys belonging to Plaintiff and Class
28 members that it may have acquired by means of unlawful, unfair or fraudulent business acts or
practices and/or unfair, deceptive, untrue, or misleading advertising.

1 84. By the conduct alleged above, Defendants have engaged in a scheme to cheat a
2 large number of consumers out of individually small sums of money.

3 85. If the Court determines that California law should not be applied to Defendants
4 Apple and/or AT&T with respect to all Class members and Sub-Class members in this case, this
5 count is alternatively brought pursuant to California law for the portion of the Class and Sub-
6 Class and/or with respect to particular defendants for which this Court determines California law
7 is applicable and the concomitant consumer protection laws of other states for the remainder of
8 the Class and Sub-Class and/or claims against particular defendants.

9 **WHEREFORE**, Plaintiff prays:

10 1. That this matter be certified as a class action with the Class and Sub-Classes
11 defined as set forth above, that Plaintiff be appointed Class and Sub-Class Representative, and
12 his attorneys be appointed Class Counsel;

13 2. That judgment be entered against Defendants for restitution and disgorgement in
14 an amount to be proven at trial; and

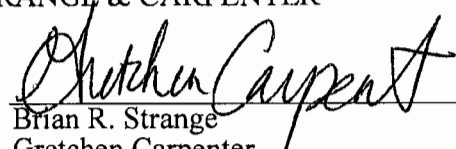
15 3. For injunctive relief, other equitable relief, or other relief that the Court may deem
16 just and proper, including pre- and post-judgment interest.

17 DATED: September 14, 2009

Respectfully Submitted,

STRANGE & CARPENTER

19
20 By:


Brian R. Strange
Gretchen Carpenter
Attorneys for Plaintiff

DEMAND FOR JURY TRIAL

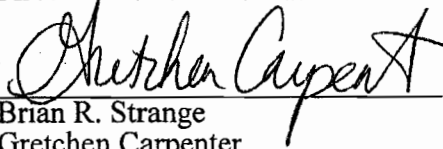
Plaintiff hereby demands a trial by jury.

DATED: September 14, 2009

Respectfully Submitted,

STRANGE & CARPENTER

By:


Brian R. Strange
Gretchen Carpenter
Attorneys for Plaintiff